

1 to investigate claims of nursing home abuse and neglect that  
2 occurred to Mr. Ronald Brophy when he was a resident of Holy  
3 Family, which she addressed to the clerk of Holy Family and to  
4 the clerk of Saint Vincents, as opposed to the director or  
5 someone in a position of power --

6 THE COURT: No officer?

7 MS. SCHULTZ: Yeah. Mr. Brophy, she asserts, was  
8 therefore a known creditor who was entitled to specific notice.

9 As noted by the Court in Victory Memorial Hospital,  
10 which is located 435 B.R. 1 (Bankr. E.D.N.Y. 2010):

11 "The mere requesting of medical files is not  
12 sufficient to render a party a known creditor.

13 Records may be requested for a variety of reasons,  
14 including to determine if a claim even exists."

15 In the case at hand, Ms. Menkes' letter was not  
16 sufficient to create a known creditor. For these reasons, the  
17 liquidating trustee does believe that Mr. Brophy was a known  
18 creditor. Had Ms. Menkes initiated litigation, sent a demand  
19 letter to an officer or --

20 THE COURT: Do you happen to have a copy of that  
21 letter?

22 MS. SCHULTZ: We do, Your Honor.

23 THE COURT: If you'll put it on the ELMO.

24 (Pause in proceedings.)

25 THE COURT: Put it as if you're reading it.

1 MS. SCHULTZ: And Your Honor, this was Exhibit G to  
2 the exhibit -- to the reply that was filed by Ms. Menkes on  
3 Tuesday.

4 THE COURT: Okay. Put it as if you're reading it.  
5 There you go. Somebody has got to put it -- there's little  
6 magic buttons that you can push down to make it so you can see  
7 the whole thing.

8 (Participants confer.)

9 THE COURT: You're doing it right, you're doing it  
10 right, you're doing it right. That's enough, right there.

11 MS. SCHULTZ: So Your Honor, the actual -- or the case  
12 -- in this case, the analysis doesn't actually end here.  
13 Despite the fact that the debtors were unaware of any claims  
14 filed by Mr. Brophy at the time the various bar dates were set,  
15 Mr. Brophy did receive notice of each of the applicable bar  
16 dates. We've gone back and we've spoke to Epiq, and we can't  
17 tell you specifically why he received notice. Our best guess  
18 is that he was in the AP system because he was owed some sort  
19 of a refund or -- you know, we -- you don't clear out your AP  
20 when you send that. You send everyone who was on your AP  
21 system for a two-year period.

22 Evidence of the notices that were served on Mr. Brophy  
23 can be found on the certificates of service that are found on  
24 this Court's docket, at Docket No. 1815, 2373, and 3132. And  
25 Your Honor, we attached these to our motion, as well.

1 THE COURT: Right.

2 MS. SCHULTZ: The liquidating trustee recognizes that  
3 each of these documents were forwarded to Mr. Brophy at Holy  
4 Family. While we weren't able to confirm precisely what  
5 happened with each piece of mail that was received on mister --  
6 received on behalf of Mr. Brophy after he left Holy Family, as  
7 set forth in Mr. Korf's declaration, it was the policy of SVCMC  
8 and each of its nursing homes to forward all mail received for  
9 decedent residents to the resident's next of kin. In the  
10 instance case, we have no reasons to believe that policy was  
11 not followed.

12 I would note, however, Your Honor, that in the medical  
13 records that were attached to the response provided Tuesday  
14 evening in support of the assertion that the debtors should  
15 have served Mr. Brophy through his next of kin Ms. Garvey, the  
16 admission form does contain an address for Ms. Garvey.

17 Furthermore, at the direction of Mr. Korf, and as set  
18 forth in his declaration employees of Grant Thornton assisted  
19 the debtors' claims and noticing agent with a review of their  
20 files to determine if the notices that the debtor sent to Mr.  
21 Brophy at Holy Family were returned to sender. They were not.  
22 Thus, the liquidating trustee believes that the debtors did  
23 everything they were required to do to provide actual notice to  
24 Mr. Brophy of the applicable bar dates, and would contends that  
25 we have established that the actual notice of the Chapter 11



1 filing and each of the applicable bar dates was provided to Mr.  
2 Brophy.

3 Turning briefly, Your Honor, to the cases relied upon  
4 in the response. The response points primarily to two cases,  
5 In Re Federated and ALMA v. AMF Bowling Center, as cases that  
6 are analogous to the case at hand. However, Your Honor, each  
7 case is readily distinguishable from the instant case.

8 In Federated, litigation was initiated prior to the  
9 Chapter 11 filing. The debtor entity was actively  
10 participating in the litigation and was plainly aware of the  
11 potential liability. There was no question that the claimant  
12 was a known creditor. That, however, is not our case. In our  
13 litigation -- in our case, litigation was commenced, not prior  
14 to the petition date, not prior to the bar date, not even prior  
15 to confirmation, Your Honor, but nearly a year after Your  
16 Honor's confirmation order was entered.

17 In the case of ALMA, the Court found that, where a  
18 creditor received no notice of a Chapter 11 filing, it was not  
19 precluded from pursuing its administrative claim against the  
20 debtors. Again, that's not our case, Your Honor. In our case,  
21 Mr. Brophy was provided with actual notice of the August 2nd,  
22 2011 deadline to file claims arising between April 14th, 2010  
23 and May 31st, 2011. He was provided notice with the May 21st,  
24 2012 deadline to file claims arising between June 1st, 2011 and  
25 April 30th, 2012, and the July 30th, 2012 deadline to file

1 claims arising between May 1st, 2012 and June 29th, 2012.  
2 Additionally, publication notice was made of each of these bar  
3 dates in accordance with the court-approved procedures. To the  
4 contrary, in the ALMA case, no mention is made of either actual  
5 or constructive notice being provided to the claimant. Thus,  
6 this case is not analogous to the case at hand.

7 Finally, Your Honor, in the response, Ms. Garvey  
8 appears to seek leave to file a late-filed claim, and she  
9 explicitly states that she is requesting that the Court lift  
10 the automatic stay to allow her to prosecute her claims. Based  
11 on the response filed this week, the liquidating trustee does  
12 not believe that any of the actions to date on behalf of Ms.  
13 Garvey constitute a proper request for either relief. Nor does  
14 the liquidating trustee believe Ms. Garvey has met her burden,  
15 either with respect to the Pioneer standard or with respect to  
16 lifting the stay.

17 To the extent that she wants such relief, Your Honor,  
18 there are appropriate mechanisms. She should not make that  
19 request in a reply, nor should she drag the liquidating trustee  
20 to state court. Rather, she should file the appropriate motion  
21 before Your Honor. The liquidating trustee will have time to  
22 respond to such a request, and Your Honor will determine how to  
23 proceed.

24 THE COURT: Thank you.

25 Yes, ma'am.

1 MS. MENKES: Yes, Your Honor. There are quite a few  
2 ad hominem attacks which are mostly gnaws in this matter to  
3 deflect the Court's attention from what is the crux of the  
4 matter. My client --

5 THE COURT: The crux of the matter is you didn't come  
6 to federal court and ask for an automatic stay; you went  
7 someplace else.

8 MS. MENKES: Your Honor, I've been practicing personal  
9 injury law litigation for twenty years, and I've litigated  
10 against entities during bankruptcy. And if they have  
11 insurance, it's an exception -- it's not property of the  
12 estate.

13 THE COURT: Not without coming to me.

14 MS. MENKES: It's never been the -- it's never been an  
15 issue.

16 THE COURT: But you've been told already three times  
17 that there's no insurance here.

18 MS. MENKES: Well, I can address that, as well, Your  
19 Honor. I do not -- and my papers today go into the insurance  
20 issue, and I think go into 523(e) issue. I was -- state court,  
21 I did go into the --

22 THE COURT: That's not the issue today. But go ahead.

23 MS. MENKES: Okay. In state court, I did go into  
24 those issues. They're not in my paper today. They were argued  
25 by the liquidating trustee, and that is not in the papers in



1 front of you right now.

2 For the first time, I received notice in the state  
3 court action about the service because I did argue that the  
4 debtor -- the creditor did not receive actual notice. And the  
5 attorney for the liquidating trustee showed me in her papers,  
6 which she was opposing the stay, the actual notice. The actual  
7 notice is dated 2012. In the -- it was sent to a Ronald Brophy  
8 at decedents --

9 THE COURT: I've looked at the docket.

10 MS. MENKES: -- at the trustee's facility.

11 THE COURT: I've looked at the docket. Have you?

12 MS. MENKES: I've looked at what I received. I -- I  
13 don't --

14 THE COURT: So you didn't go on the Court's website,  
15 and look it up yourself.

16 MS. MENKES: I've looked at -- I've looked at what  
17 I've received in the -- I just -- I just registered for the  
18 electronic court's docket. I don't --

19 THE COURT: You can also come to court. Okay.

20 MS. MENKES: Mr. Brophy was a resident at Holy Family,  
21 that's where this notice of the -- were served on him. They  
22 were served on him in 2011 and 2012. Their own records  
23 indicate that he left the facility June 7th, 2010, and he died  
24 June 13th, 2010.

25 It also indicates that his next of kin is Elaine

1 Garvey. Elaine Garvey had -- the second page of that letter  
2 that was on the screen before is the -- her authorization to  
3 get protected medical information regarding her father, and  
4 it's clearly checked off for the purposes of litigation.

5 THE COURT: What's the date of that letter?

6 MS. MENKES: The letter is -- they're all in 2010,  
7 they're all in before the bar date. So I can look at it in my  
8 papers, if you give me a minute. The letters were dated -- was  
9 letters to --

10 MS. SCHULTZ: There's two, Your Honor.

11 MS. MENKES: Yeah, both to --

12 MS. SCHULTZ: The first one is October 18th, 2010, and  
13 September 21st, 2010.

14 THE COURT: Okay.

15 MS. MENKES: And they're both accompanied by  
16 authorizations from Ms. Garvey, saying that the purpose of  
17 these -- the request is for litigation. So that would  
18 definitely make her a known creditor, and that was before the  
19 bar date, before the action had started.

20 There -- she maintained her statutes of limitations in  
21 state court, not knowing that there was a bankruptcy  
22 proceeding. Had she known, she would have filed the proper  
23 documents. She did not know. And there are due process  
24 considerations here. I mean, it's two years later. He was  
25 dead. He was dead at the time he was served. I don't think



1 the debtor has done due diligence in locating, properly  
2 locating a known creditor to the estate, and serving them with  
3 actual notice.

4 THE COURT: Did -- was -- did Holy Family respond to  
5 that letter?

6 MS. MENKES: They sent medical records. They didn't  
7 say -- that's all they did, they sent medical records.

8 And the request for medical records is never made to  
9 an officer of the hospital; it's always made to medical  
10 records. And it would seem that, someone is requesting medical  
11 records for the purpose of litigation --

12 THE COURT: You don't assume anything.

13 MS. MENKES: Well, due diligence would require a  
14 medical records personnel who works for the -- for the estate  
15 to see if it's for the purpose of litigation, to look at --

16 THE COURT: But they acted in conformity with your  
17 letter. The letter requests medical records; you got the  
18 medical records.

19 MS. MENKES: Correct.

20 THE COURT: Okay.

21 MS. MENKES: Correct. But it also advises them of a  
22 known creditor to the estate. And they served the decedent  
23 after he was dead, and their own records show that he was dead,  
24 and their own records show that he had left the facility before  
25 the service of the notification. So I don't see how there

1 could possibly be good service on him. I mean, they're  
2 required to do more than just --

3 THE COURT: No. It says investigate claim, is what it  
4 said. And they sent the information you needed to investigate  
5 a claim.

6 MS. MENKES: I'm talking about the trustee's -- the  
7 debtors' notification of the bar dates and the proceedings --

8 THE COURT: I hear you.

9 MS. MENKES: -- with Brophy.

10 THE COURT: I hear you.

11 MS. MENKES: And that was done in 2011 and 2012. He  
12 died in June 2010, and it's in their own facility's records.  
13 And he left June 7th, 2010, again, in their own facility's  
14 records. And his next of kin is listed there. His wife was  
15 also listed there with an address. I mean, had anyone known --  
16 and when he was a resident there, he was suffering from  
17 psychosis and dementia. So even if he had not died and left --  
18 I mean, people are in nursing homes because they require long-  
19 term care, or even the community -- most nursing home residents  
20 do suffer from dementia. So it's certainly not due diligence  
21 to serve somebody who may -- even if they're alive, may be  
22 suffering, in their records, which it indicates, from psychosis  
23 and dementia. So I find that disingenuous.

24 THE COURT: I don't think you're actually arguing the  
25 law to me. You're arguing a little emotion here. Okay. Keep

1 arguing.

2 MS. MENKES: No, that's -- well, I'm explaining the  
3 facts --

4 THE COURT: I'm -- I heard.

5 MS. MENKES: Okay.

6 THE COURT: Keep talking to me.

7 MS. MENKES: All right.

8 THE COURT: You've heard the case law. I'm not  
9 hearing you respond to the case law.

10 MS. MENKES: I think Federated is on point. I think  
11 the other case that I put in my papers is on point. There's an  
12 absolute due process requirement that a known debtor --

13 THE COURT: Have you listened to the requirements of  
14 due process? There's actual notice, which seems to me, from  
15 what I've seen so far, and seeing the docket, it was given at  
16 the last known address. And then there's the constructive  
17 notice, which it seems to me we have here, which is  
18 publication. And it was done, so that put the onus on, at  
19 least from what I'm hearing, the constructive notice for an  
20 unknown, which Ms. Garvey would be at this time, so ...

21 MS. MENKES: Well, it's my position that she was a  
22 known creditor, and she never received any --

23 THE COURT: Okay.

24 MS. MENKES: -- notification, as the trustee has  
25 argued, that --



1 THE COURT: That's your position. Okay. I'm hearing  
2 you. You have nothing else?

3 MS. MENKES: No. If she had received notification,  
4 she would have -- when she retained me, she would have  
5 proceeded with filing the claims. I mean, the issues are  
6 horrendous, as you can see in the papers, and --

7 THE COURT: Well, not only was publication notice  
8 given, Saint Vincents was an open and notorious case that was  
9 often reported in the news.

10 MS. MENKES: Well, he was a resident of Holy Family --

11 THE COURT: Why did you do an order to show cause in  
12 state court instead of coming to this Court? What was your  
13 purpose in doing that?

14 MS. MENKES: Because at that point, I was under the  
15 impression that there was property that was not part of the  
16 estate, that there was insurance, if --

17 THE COURT: After you had been told.

18 MS. MENKES: I was given no supporting documentation.  
19 I was just given a -- somebody told me something on the phone.  
20 I was not -- never was sent any documents by the trustee, other  
21 than threatening letters and copies of motions. I was never  
22 given bar dates, I was never given -- I had to do all that  
23 research on my phone, to find out what was going on.

24 THE COURT: I believe there was an affidavit included.  
25 Okay.

1 MS. MENKES: And I also did want to add that the  
2 Bankruptcy Code --

3 THE COURT: Did you stop and go look at the plan, the  
4 bankruptcy plan?

5 MS. MENKES: Your Honor, I did not do that. I'm not a  
6 bankruptcy attorney. And this -- I thought it was outside of  
7 the property of the estate. And I certainly owe my client  
8 zealous representation, and to maintain her causes of action,  
9 because to not so is legal malpractice. And I mean, I -- I  
10 really believe that she was a known creditor, she did not  
11 receive actual notice. You can't notice a dead person. And  
12 the Bankruptcy Rule 3002 permits for late filing in the  
13 interest of justice, and --

14 THE COURT: And who explained that to you?

15 MS. MENKES: I did research. I was -- that's why I  
16 asked for an adjournment, because I'm not a bankruptcy  
17 attorney. I spent my time -- I wanted to research that in  
18 depth, by that -- but that was denied. So I did as much  
19 research as I could --

20 THE COURT: Okay.

21 MS. MENKES: -- in the time that I had.

22 THE COURT: Anything else you wish to add?

23 MS. MENKES: Oh, yes. I do want to add -- yeah. In  
24 terms of the insurance, parties purchase insurance so, if there  
25 is a claim, they don't have to pay out of their own pocket. It

1 doesn't absolve them of liability. If they have no insurance,  
2 it doesn't mean that the claim goes away. It means that they  
3 are responsible from their own pocket, there's no insurance  
4 policy that's going to pay for the liability. So whether or  
5 not there's insurance is not dispositive on whether or not  
6 there's a claim.

7 THE COURT: Except there's an automatic stay in place  
8 in federal court. I don't know -- there's an automatic stay,  
9 there's a confirmed plan, there's a plan injunction in place.  
10 I'm struggling to understand your argument. I'm trying to  
11 understand your argument, but I'm struggling with it.

12 MS. MENKES: Well, the argument is that it was no  
13 notice.

14 THE COURT: There was a plan injunction, and there's a  
15 discharge.

16 MS. MENKES: But there was no notice of the plan to  
17 this creditor. That's -- there was --

18 THE COURT: That's your -- that's your -- your real  
19 basis before me today is that you are saying that Ms. Garvey  
20 was entitled to actual notice --

21 MS. MENKES: That's what I'm saying.

22 THE COURT: -- and that's your -- that's the bottom  
23 line of your argument.

24 MS. MENKES: She was a known creditor, she was  
25 entitled to actual notice. The decedent was dead over a year



1 when the notice was sent.

2 THE COURT: Very good. I've heard you. But we're  
3 here on an order to show cause, too, that went to state court.

4 Yes, do you have anything you wish to add? The Court  
5 will take a recess.

6 MS. SCHULTZ: No, Your Honor.

7 THE COURT OFFICER: All rise.

8 (Recess taken at 11:50 a.m.)

9 (Proceedings resume at 11:55 a.m.)

10 (Call to order of the Court.)

11 THE COURT: Does anyone wish to add anything?

12 MS. MENKES: Your Honor, I actually do wish to add  
13 something.

14 THE COURT: State your name for the record.

15 MS. MENKES: Sheryl Menkes, attorney for Elaine  
16 Garvey.

17 I was rereading my papers --

18 THE COURT: Uh-huh.

19 MS. MENKES: -- during this break, and I do believe  
20 the cases are on point. And I will tell you the cases with the  
21 citations. And -- okay. ALMA, the AMF Bowling Centers --

22 THE COURT: Right. That was where no notice was given  
23 at all, no publication notice, no -- any notice whatsoever.

24 MS. MENKES: It was held that a personal injury  
25 claimant would have no reason to know a corporate debtor had

1 filed for bankruptcy without formal notice, and without formal  
2 notice having been served prior to the bar date, plaintiff's  
3 claim was not barred by the bankruptcy discharge.

4 And Federated, it was held that --

5 THE COURT: That was the litigation that was started  
6 prior to the filing of the Chapter 11.

7 MS. MENKES: Right. But it was held that the creditor  
8 was aware of contingent liability, and so as the result, they  
9 should have been served with formal notice. Ms. Brophy's [sic]  
10 authorization, stating that she was requesting medical records  
11 for the purposes of litigation, gives knowledge of a contingent  
12 claim, the same -- for the same way, the same way. So the  
13 contingent liability for the plaintiff's injury should not be --  
14 -- should not be barred.

15 And that's really all I have to say. Procedurally, I  
16 don't practice in Bankruptcy Court, so I've not -- I'm not  
17 aware of all of the --

18 THE COURT: You are a lawyer, so ...

19 MS. MENKES: I am a lawyer, and I've -- my --

20 THE COURT: Be careful around here. Just be careful.  
21 There are model rules called "competency," and I'm not so sure  
22 you want to admit to some of these --

23 MS. MENKES: Well, I --

24 THE COURT: It's your duty to look at the procedures  
25 and know them. Okay. You may be seated.

1 MS. MENKES: All right. Thank you.

2 THE COURT: Ms. Schultz, do you have anything you wish  
3 to add?

4 MS. SCHULTZ: No, Your Honor. Thank you.

5 THE COURT: Very good.

6 The debtors in this case filed a petition under  
7 Chapter 11 of the Bankruptcy Code on April the 14th, 2010.  
8 Again, I noted earlier, it was pretty open and notorious, with  
9 a lot of press coverage. That doesn't mean notice, but there  
10 was a lot of noise about this case.

11 Thereafter, certain bar dates were established. The  
12 first bar date for all general prepetition claims was ordered  
13 on August the 12th, 2010, and set for October the 12th, 2010.  
14 So bar dates in this case, October the 12th, 2010. And that's  
15 the last -- "bar date" means the last day to file claims.

16 The second last date to file claims was for  
17 administrative claims that arose from the date of the petition  
18 until May 31st, 2011. That was ordered, and it was set for  
19 August the 2nd, 2011.

20 Then there was a third bar date for administrative  
21 claims that arose between June 1st, 2011, and April 30th, 2012,  
22 and that was set for May the 21st, 2012.

23 And as has been stated on the record, the debtor had a  
24 confirmed plan that went effective June the 29th, 2012.

25 Pursuant to that plan, the fourth last date to file



1 claims -- and these for administrative claims -- between May  
2 1st, 2012, and the effective date of the plan was set for June  
3 30th, 2012.

4 The trustee states and shows that the debtor served  
5 the decedent with notice of the second, third, and fourth bar  
6 dates, together with the plan, at the decedent's last known  
7 address. In addition, the trustee states that the notice of  
8 the first and second bar dates were given by publication notice  
9 in the New York Times and the New York Post.

10 On April the 13th, the trustee learned that certain  
11 debtors, Saint Vincents Catholic Medical Center and Holy Family  
12 Home, had been named as defendants in a lawsuit brought by the  
13 plaintiff. The trustee, according to the affidavit and what  
14 I've heard in court today, reached out to plaintiff's counsel,  
15 informing her that the lawsuit was a violation of the automatic  
16 stay and plan injunction, and requested that the action be  
17 discontinued. The response was a request that the automatic  
18 stay be lifted to proceed against the insurance proceeds or the  
19 insurance company, a decision that is clearly only for this  
20 Court. After the trustee investigation into available  
21 insurance, the trustee responded with a letter, indicating that  
22 no insurance was available, and the lawsuit was never  
23 discontinued.

24 The trustee also contends that Attorney Menkes has  
25 engaged in dilatory tactics, to delay the filing of the instant

1 motion to enforce a plan injunction, and has utterly  
2 disregarded this Court's injunction. Supporting this  
3 contention is the fact that Attorney Menkes filed an order to  
4 show cause in state court at the end of June in 2013, and then  
5 served the order on the trustee July the 18th, 2013. The  
6 purpose of the order to show cause, which required an  
7 appearance by the trustee on July the 31st, 2013, was to ask  
8 the state court to enter an order compelling the trustee to  
9 lift the stay on plaintiff's personal injury claim.

10 Again, I have to admit to being a little perplexed  
11 here, to have a state court or anyone besides a federal  
12 bankruptcy court or a federal court lift the stay. That  
13 perplexes me that that was even argued.

14 Attorney Menkes has requested an adjournment in the  
15 matter presently before this Court, and that -- the Court --  
16 that was rejected by this Court.

17 I have received opposition to the trustee's motion,  
18 which focuses on the fact that her client lacked notice of the  
19 bankruptcy or relevant bar dates. Specifically, the opposition  
20 indicates that service on the decedent was made at 1740 84th  
21 Street, Brooklyn, New York, which is the address of one of the  
22 debtors, and that the decedent was discharged from the facility  
23 on June 7th, 2007. And that, basically, is the crux of our  
24 issue.

25 The issue before the Court today, that it's being

1 asked to decide, is whether the plaintiff can continue with her  
2 state court lawsuits against the debtors. Directly applicable  
3 is Section 11.3 of the debtors' confirmed plan, which went into  
4 effect on June 29th, 2012, which states that:

5 "Any injunction or stay arising under Section 105 or  
6 Section 362 of the Bankruptcy Code shall remain in  
7 full force and effect until the closing of the Chapter  
8 11 case."

9 Furthermore, Section 1104 states that:

10 "Pursuant to the Bankruptcy Code Section 1141(b), the  
11 distributions, rights, and treatments provided in the  
12 plan shall be in complete satisfaction, discharge, and  
13 release any claims and causes of action, whether known  
14 or unknown, against the debtors."

15 I cite from DePippo v. Kmart, 335 B.R. 290, which  
16 says:

17 "It is well established that, once confirmed, a  
18 debtors' reorganization plan binds the debtor and all  
19 creditors, regardless of whether the creditor has  
20 accepted the plan, provided that that creditor has  
21 been given sufficient notice to satisfy due process.  
22 If due process is satisfied, an order confirming a  
23 reorganization operates to discharged all unsecured  
24 debts or liabilities, even those of a tort victim who  
25 was unaware of the debtor's bankruptcy."



1 Again, that's from DePippo v. Kmart.  
2 Notice sufficient to satisfy due process is not the  
3 same for all creditors. Non-creditors must be given  
4 direct notice by mail, while publication notice is  
5 generally sufficient for unknown creditors."  
6 Curatola v. Saint Vincents, that is a 2008 Westlaw,  
7 1721471 (S.D.N.Y. 2008), where they -- that case cites Mullane  
8 v. Central Hanover Bank and Trust Company, which is a United  
9 States Supreme Court decision at 339 U.S. 306.  
10 "A known creditor is one whose identity is either  
11 known or reasonably ascertainable by the debtor,  
12 someone who can be identified through reasonable,  
13 diligent efforts. Conversely, a creditor is unknown  
14 if its interests are either conjectural or future or,  
15 although they could have been discovered upon  
16 investigation, do not, in due course of business, come  
17 to the knowledge of the debtor. Importantly, while a  
18 debtor must directly notify entities identified as  
19 creditors in the debtor's record, a debtor is not  
20 required to search elsewhere for those who might have  
21 been injured. In other words, a debtor need not be  
22 omnipotent or clairvoyant. They need only do what is  
23 reasonable under the circumstances to provide notice  
24 to ascertainable creditors."  
25 The plaintiff must first file a complaint against

1 multiple debtor-defendants -- excuse me.

2 The plaintiff first filed a complaint against multiple  
3 debtor-defendants in May of 2013. And the complaint was sent  
4 to counsel for the trustee on or about June 5th, 2013.

5 A few years before filing the complaint, the plaintiff  
6 also sent one letter to Holy Family Home, one of the debtor-  
7 defendants, on July the 23rd, 2010, and two letters to Saint  
8 Vincents Catholic Medical Centers, the other defendant-debtor,  
9 on September the 10th, 2010, and October the 18th, 2010. Each  
10 of those letters indicates that the plaintiff sought -- and I  
11 quote from the letter:

12 "-- to investigate claims of nursing home abuse and  
13 negligence that occurred to Ronald Brophy when he was  
14 a resident at Holy Family Home."

15 In response to those letters, it may be that the  
16 debtor added the decedent to the service list -- and I think  
17 that they would not know that the decedent was, at that time,  
18 deceased. And thereafter, the decedent mailed notice of the  
19 second, third, and fourth bar dates, in addition to the  
20 occurrence of the effective date of the plan. I've heard today  
21 from Attorney Menkes that, in response to the letter, the  
22 medical records were sent to the plaintiff.

23 The only shred of evidence to support an assertion  
24 that the plaintiff was a known creditor are the three letters  
25 sent to the debtor -- debtor entities in July, September, and

1 October in 2010. These letters stated that they are sent to --  
2 again, I quote -- "investigate claims of nursing home abuse,"  
3 and that is distinguishable from demand for payment evidencing  
4 a claim or some communication with the debtor concerning the  
5 existence of the creditor's claim. And that's Drexel Burnham  
6 Lambert, 151 B.R. 674 (S.D.N.Y. 1993).

7 "To be a known creditor, the debtor must have in its  
8 position, at the very least, some specific information  
9 that reasonably suggests that both the claim for which  
10 the debtor may be liable and the entity to whom it  
11 will be liable."

12 In Re Crystal Oil, 158 F.2d 293, which is a Fifth  
13 Circuit opinion.

14 "The Court finds these letters insufficient to set  
15 forth facts or information that reasonably indicate  
16 plaintiff's intention to file or otherwise prosecute a  
17 future claim against the debtor."

18 Another case, In Re Trump Taj Mahal Associates, 156  
19 B.R. 928, a District of -- Bankruptcy Court in N.J., 1993,  
20 finding that:

21 "A creditor who sent a letter to the debtor regarding  
22 a possible claim was not a known creditor, as many  
23 people threatened to file suit, although only a  
24 nominal number, if any, actually brang suit."

25 Even if one believes that the plaintiff was a known



1 creditor, the debtors sent direct mail notice to the decedent  
2 at the decedent's last known address.

3 "To determine whether notice in this manner was  
4 reasonably given, the proper inquiry is whether the  
5 noticing party acted reasonably in selecting means  
6 likely to inform persons affected, not whether a  
7 particular party actually received the notice."

8 That's In Re Richie Risk-Linked Strategies Trading,  
9 471 B.R. 331, again citing a Second Circuit decision, Weigner  
10 v. The City of New York, 852 F.2d 646.

11 "When evaluating service, the noticing party must use  
12 reasonable, diligent efforts, which does not mean that  
13 the noticing party must conduct impracticable and  
14 extended searches in the name of due process.  
15 Instead, reasonable diligence involves a search  
16 focused on the debtor's own books and records."

17 The trustee indicated that it sent notice of the  
18 various bar dates and the effective date of the plan to the  
19 decedent's last known address. This address was, therefore,  
20 what the trustee had in their books and records at the time  
21 notice was effectuated, requiring the trustee to contact every  
22 party who was either a resident in one of the debtors' nursing  
23 homes, or otherwise a patient in one of the debtors' hospitals.

24 "To determine whether the address on file was the  
25 current address or an impracticable extended search

1           that" -- "is an impracticable and extended search that  
2           would completely vitiate the important goal of prompt  
3           and effectual administration and settlement of the  
4           debtor's estate."

5           See USH, 223 B.R. 654 (S.D.N.Y).

6           Coupled with publication notice of the various bar  
7           dates, this Court believes that notice was reasonably given and  
8           was sufficient under the circumstances. The plaintiff in this  
9           action was more likely an unknown creditor, as plaintiff's  
10          lawsuit had not been filed as of the time of the bar date  
11          notices were set and served.

12          As the District Court in Curatola v. Saint Vincents  
13          Catholic Medical Centers of New York stated, the creditor in  
14          that action could not have been known -- a known creditor  
15          because she had not yet filed a negligence claim against Saint  
16          Vincents. That's a Southern District of New York 2008 case,  
17          2008 WL 1721471.

18          Therefore, having not filed a complaint against the  
19          debtors, it was not the debtors' duty ...

20          "-- to search out each conceivable or possible  
21          creditor and urge that person or entity to make a  
22          claim against it."

23          In Re Brooks Fashions, 224 B.R. 436, a Southern  
24          District of New York case.

25          Given the plaintiff's status as an unknown creditor,

1 constructive notice of the bar date claim -- bar claims date by  
2 publication satisfies the requirement of due process. Chimiron  
3 Corp. v. Jones (phonetic), 72 F.3d 349 (3d Cir. 1995); Mullane  
4 v. Central Hanover Trust, 339 U.S., Supreme Court case found at  
5 306, 1950.

6 As notice was sufficient as to the plaintiff, the  
7 confirmed plan and the provisions therein; namely, the plan  
8 injunction and extensions of the automatic stay bar the  
9 plaintiff from continuing the state court lawsuit, the trustee  
10 has requested fees for prosecuting this action.

11 The fees are necessary and were necessary to defend  
12 the state court order to show cause. That action was clear and  
13 blatant violation of the automatic stay.

14 Ms. Schultz, I'm at a bit of an issue here. How much  
15 -- I need to separate the costs here. To defend the state  
16 court action and the automatic stay, you are entitled to fees  
17 and expenses for doing that, and I will grant those.

18 I have a bit -- not a dilemma, but I'm sort of at a  
19 crosswords -- crossroads here. Had a motion been filed here  
20 for the automatic stay and enforcement of the plan injunction  
21 might have been a routine business and properly brought here,  
22 you might not have been entitled to fees. So I'm struggling.  
23 I will give you fees and expenses for all the state court work  
24 that you had to do. Do you have any ball park idea of how much  
25 that would be?



1 MS. SCHULTZ: Your Honor, I don't know how much our  
2 state court work is. What I would propose is that we put  
3 together a schedule --

4 THE COURT: Okay.

5 MS. SCHULTZ: -- for Your Honor, and we can copy Ms.  
6 Menkes on it; send it to chambers, if that's acceptable, as we  
7 would normally submit an order. I think that would give you an  
8 idea of precisely --

9 THE COURT: And would you --

10 MS. SCHULTZ: -- how much time and expenses --

11 THE COURT: -- break it down for me?

12 MS. SCHULTZ: Absolutely, Your Honor.

13 THE COURT: Because had this been a legitimate motion  
14 for -- to lift the stay, there would be some expenses that  
15 would not have been attributable to the plaintiff in the state  
16 court action.

17 MS. SCHULTZ: Yes, Your Honor. We understand.

18 THE COURT: So if you'll break those down that way, I  
19 can have a hearing on it or I can do it on the papers. But I  
20 am -- I'm definitely awarding fees for all the state court  
21 matters. I will reserve rewarding fees on any of the  
22 injunction matters and the motion to -- for the injunction at  
23 this time.

24 MS. SCHULTZ: We understand, Your Honor. Would it be  
25 acceptable if we submitted those within seven days?

1 THE COURT: I think I would really like to have those  
2 filed on ECF.

3 MS. SCHULTZ: Okay.

4 THE COURT: I want them to be open and notorious; I  
5 don't want them just sent to chambers. But I think you -- yes,  
6 on seven days. And I want you to give Ms. Menkes a copy of  
7 that. And Ms. Menkes, I will allow you to respond --

8 MS. MENKES: Thank you, Your Honor.

9 THE COURT: -- to the expenses.

10 MS. SCHULTZ: Your Honor, can we submit that in the  
11 form of an affidavit from myself?

12 THE COURT: Yes. But I want an order of the violation  
13 of the stay of the state court matters. And like I say, I --  
14 there is, also, a violation of the plan injunction. I want to  
15 -- again, I -- you can hear I'm struggling.

16 I -- Ms. Menkes, I do not like to reward people that  
17 do not understand the procedures of any court that they are in  
18 front of. You may understand state court procedures. But if  
19 you come to a federal bankruptcy court, you need to have dealt  
20 with -- at least talked to someone. There is a model rule of  
21 competence that -- I'm not there, I'm not trying to push it.  
22 But competence is 101 of the Model Rules of Professional  
23 Responsibility and --

24 MS. MENKES: Your Honor, I'll -- in response, I'll say  
25 my research, I have Court of Appeals cases saying there's

1 concurrent jurisdiction in how the bankruptcy affects third  
2 persons. Gordon v. -- I forget the name. And that's why I  
3 proceeded in state court.

4 THE COURT: I have already heard your arguments. I  
5 have discounted your arguments. I have made my ruling.

6 MS. MENKES: No, fine. I didn't bring that up before,  
7 but I --

8 THE COURT: There is a possibility of concurrent  
9 jurisdiction in certain matters, but that is not where we are  
10 here, and that's not what I had in front of me.

11 So I'm sorry to be struggling, that I can't do this  
12 clear-cut. But I -- honestly, Ms. Menkes, you have heard the  
13 arguments today. I can tell you, that's expensive argument.  
14 It's taken a lot of work for Ms. Schultz and her firm to bring  
15 that argument. I understand that.

16 And what I am -- I will be candid with everybody in  
17 the room. What I am struggling with is that I understand,  
18 looking at your letterhead, that you're a sole practitioner,  
19 and you had an argument that did at least raise to the level of  
20 what needed to be brought to this Court in the first place. I  
21 do also understand that, when people work hard, they need to be  
22 paid for what they do. And Ms. Schultz and her firm had to  
23 work hard to get here today. So I -- so it's not just the  
24 fees, what is reasonable for reimbursement -- and I know your -  
25 - what is your going rate, Ms. Schultz?



1 MS. SCHULTZ: Eight hundred and fifty dollars an hour,  
2 Your Honor.

3 THE COURT: That's what I thought. So court is in  
4 dismissed -- court is adjourned.

5 THE COURT OFFICER: All rise.

6 (Proceedings concluded at 12:22 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript  
from the electronic sound recording of the proceedings in the  
above-entitled matter to the best of my knowledge and ability.

August 19, 2013

Coleen Rand, AAERT Cert. No. 341

Certified Court Transcriptionist

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